Filed 4/12/10 P. v. Cossairt CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CARL WADE COSSAIRT, Defendant and Appellant.	C061883 (Super. Ct. No. 07F11513)

Convicted of first degree murder, defendant Carl Wade Cossairt appeals, contending some of his statements to the police were inadmissible under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] and in any event there was insufficient evidence to support the jury's finding that he acted deliberately and with premeditation.

Finding no merit in these arguments, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2007, defendant was living in a duplex in Citrus Heights with Chester (Chet) Corser, Teri Sherman, and

Sherman's 12-year-old daughter, Taryn. Corser lived in one of the bedrooms; Sherman and her daughter lived in the other. Defendant lived in the garage, which had been converted into a bedroom.

Sherman and her daughter had come to live there in August 2006, when they had to vacate their previous residence and had nowhere else to live. Defendant had already been living there for about four months, and he asked Corser if Sherman could rent the extra bedroom.

Defendant and Sherman had dated for nearly 10 years, from the time Taryn was one-and-one-half years old until she was 10. In fact, Sherman admitted defendant had raised Taryn. In December 2007, defendant was still hurt and angry and did not want to accept the fact he and Sherman were not together anymore. Around May 2007 Taryn's father had moved in down the street, and Sherman began dating him, such that by December she was splitting her time between both households.

For defendant, it had "been hell" ever since Taryn's father had returned because it felt like Sherman was "taking [her] thumb and squishing [him]." And he did not like Corser commenting on the relationship. When Corser was drunk, Corser would comment on Sherman "going up the street again." Before Thanksgiving in 2007, defendant told Corser that if he heard Corser bad-mouthing Sherman again, he would "take care of it with [Corser] one-on-one." Defendant felt that he had "earned" the "right" to bad-mouth Sherman because they were together so long and he still had feelings for her.

Corser, who used a wheelchair, regularly drank between 8 and 12 beers each day on the porch from about 8:00 in the morning, after he had his cup of coffee, until 1:00 to 2:00 in the afternoon.

In late November or early December 2007, Sherman loaned Corser $20 for beer because he was not going to get paid for about a week. Upon coming home from work on December 3 (a Monday), Sherman learned from the man across the street that he had taken Corser to the bank to withdraw some cash. When she got home, it appeared defendant and Corser had been arguing because Corser was mad. Corser got mad while Sherman was making hamburgers for everyone, so she stopped cooking and asked for her money. He threw the $20 at her, and she picked it up and left. During this incident, Corser said something to her like, "oh, going down to your boyfriend's house."

Sherman did not return to the duplex again that night. When she tried to return the next day, the house was locked up and no one answered the door, so she could not get in. On either Tuesday or Wednesday, she went into the garage and said hi to defendant, but she did not go into the house. She thought it was unusual that she did not see Corser, so she asked defendant, and he said Corser and his nephew had gotten into an argument, which led Sherman to believe Corser was depressed and in his bedroom, because that had happened a couple of times before.

When Sherman returned to the duplex on Thursday, defendant was "really excited" about some money he claimed to have found

in a black pouch at a liquor store. It was unusual for defendant to have money because he did not have a job. He wanted to go Christmas shopping for Taryn, so he and Sherman went to the mall, where he spent $100 to $150.

Sherman spent Thursday night in her room at the duplex. Defendant woke her about 7:15 a.m., frantically telling her that Corser was dead in his room.

A few days before, one of the neighbors had seen defendant yelling at Corser, saying, "what did you say to her," and, "if you say anything like that again, I am gonna kill you." After that, she did not see Corser sitting outside like he usually did.

On the morning of December 7, defendant went to another neighbor's house and asked if she had any sleeping pills. She offered him some Tylenol PM, but he wanted something stronger. When she asked if he was okay, he said "no" and told her he just wanted to take some pills and go to sleep and never wake up. When she asked him what happened, he said, "do you remember when I said I was going to take care of somethin' if [Corser] said something about [Sherman]," then he said, "well, I did it," "I hit him." Defendant told the neighbor that Corser deserved it because he was bad-mouthing Sherman and defendant did not want to hear any more of it.

Transactions occurred on Corser's bank account at a liquor store on December 3 and 4, at two banks on December 3 and one on December 4, and at a casino on December 3.

Corser's body was found on the floor in his bedroom. Before he died, he suffered bruises on the back of both his shoulders, his back, both his eyes, his nose, his lips, and his chin. He also had a broken tooth that bruised the inside of his mouth, bleeding from his nose and left ear, and blood in his sinuses and his lungs. He had also been strangled. The cause of death was strangulation and multiple blunt force injuries.

In statements to the police, defendant initially denied that anything happened between him and Corser when nobody was around. Later, however, he admitted that after Sherman took the $20 and left, he went back into the duplex and, after arguing with Corser, pushed his wheelchair, causing it to tip over backwards. Defendant claimed, however, that after he did this, he simply walked out, and when he came back later, Corser was not there.

When the detective left the room during the interview, defendant was recorded crying and saying, "I'm sorry, Chet. I'm so sorry. I'm so sorry. Please forgive me. Oh, God. Oh, God. Please forgive me."

In a later statement to another police officer, defendant stuck with his story of pushing over Corser's wheelchair and walking out. After the officer told him that "story" was "bullshit" and was "not going to fly," defendant claimed he "fell on" Corser when he pushed the wheelchair, landing on his chest and neck.

Police found a letter dated December 3, 2007, from defendant to Sherman concealed in a pillowcase in the garage

where defendant stayed. In the letter, defendant wrote, "Teri I took care of the Chet (asshole) trouble. For good this time. [¶] Teri I had did something very bad. And I can not make it any better. I will be in so much trouble, for what I had done."

Defendant was charged with first degree murder and possession of methamphetamine (found in the search of the garage). Before trial, he moved to suppress the statements he gave to the police after deficient *Miranda* warnings. The People opposed the motion on the ground defendant was not in custody when he gave his statements. The trial court agreed, finding "[b]ased on the totality of the circumstances . . . that the defendant's interview . . . did not occur in a custodial setting." Accordingly, the trial court denied the suppression motion.

The jury found defendant guilty of both charges. The trial court sentenced him to an indeterminate term of 25 years to life for the murder and a consecutive two-year term for the possession charge.

DISCUSSION

I

Custodial Interrogation

Under *Miranda*, "'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 179.)

Here, defendant contends the trial court erred in refusing to suppress his statements to Citrus Heights Police Detective Nicole Bolden because "independent review of the facts which were undisputed and those on which the trial court found . . . will lead this court to conclude that [defendant] was subjected to a 'custodial' interrogation." Unfortunately for defendant, that is not the conclusion to which we have been led. Instead, like the trial court, we conclude defendant was not in custody when Detective Bolden interrogated him.

In a case like this, "We review the record . . . to determine whether a reasonable person in defendant's position would have felt he or she was in custody. Disregarding the uncommunicated subjective impressions of the police regarding defendant's custodial status as irrelevant, we consider the record to determine whether defendant was in custody, that is, whether examining all the circumstances regarding the interrogation, there was a '"formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citation.] As the United States Supreme Court has instructed, 'the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.'" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

For purposes of determining whether a particular interrogation was "custodial," "Courts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person

voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

We apply the "deferential substantial evidence standard [citation] to the trial court's conclusions regarding '"basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .'"' [Citation.] Having determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 402.)

Here, the basic facts do not appear to be in dispute. After defendant consented to a search of the duplex, Citrus Heights Police Officer Christopher Frey asked if defendant "had any problems going down to the police station to continue speaking with Detective Bolden about the incident." Defendant was advised he was not under arrest, and he went voluntarily and eagerly.

Detective Bolden interviewed defendant at the police station for around two or three hours. Near the outset of the interview, she tried to give him proper *Miranda* warnings but they were incomplete.

There are two recordings of the interview, with a gap in between them when the recording device "ran out of space." According to defendant, the two recorded parts of the interview "were quite dissimilar" "in tone and focus." In his view, based on this different "tone and focus," "whatever [we] may conclude in [our] independent review with regard to 'custody' at the commencement of the questioning, a reasonable person would not have believed himself free to leave at the time the damaging admissions were made to the detective" during the second part of the interview.

Despite what defendant's appellate counsel may believe, we will not engage in any "independent review with regard to 'custody' at the commencement of the questioning" absent an argument on that point from defendant. "[I]ndependent review" does not mean review of issues independent of the arguments the appellant chooses to make. Even in a criminal case,

"[j]udgments and orders are presumed correct, and the party attacking a judgment or order has the burden of affirmatively demonstrating error." (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534.)

Here, defendant has not offered any argument directed toward "the commencement of the questioning." In his reply brief, he points to the portions of his opening brief in which he asserted "why he believes there was a custodial interrogation," and, as he himself admits, the referenced argument focuses solely on how "matters evolved after the break" in the recording.

In the absence of any argument about why the interview was custodial *before* the break, we must presume the trial court correctly found it was not, and the question posed by defendant's appeal becomes whether something about the latter part of the interview changed it from noncustodial to custodial. Even as to this question, however, defendant's argument is not particularly helpful. Without discussing the "variety of relevant circumstances" (*People v. Aguilera*, *supra*, 51 Cal.App.4th at p. 1162) bearing on whether the first part of the interview was custodial, defendant leaves us without sufficient context to properly determine whether, at some point in the latter part of the interview, the interview *became* custodial.

On top of this problem with context, defendant's argument that the interview became custodial is simply not persuasive. The gist of defendant's argument is that in the latter part of the interview, Detective Bolden "began to lead the questioning

and to focus on strife between [defendant] and Mr. Corser," as well as "on why [defendant] had not checked on Mr. Corser during the week he had been missing." In defendant's view, because he "had been in the room for hours, he had only been allowed to leave with a police escort,[1] and the detective's 'spotlight' was squarely directed at [him]," "a reasonable person would have felt himself to be in police custody."

We disagree that these circumstances were sufficient to lead a reasonable person to believe his freedom of movement had been restrained to the degree associated with a formal arrest. This case is unlike either of the cases defendant cites to support his argument. In *State v. Champion* (Minn. 1995) 533 N.W.2d 40, "[d]uring what was initially a noncustodial, consensual [police station interview], [the] defendant made a highly incriminating statement" -- specifically, he admitted going to the murder victim's condominium "to 'roll' the victim," then suddenly admitted, "'I put my hands around his neck and tried to suffocate him into unconsciousness.'" (*Id.* at pp. 41, 42.) Giving the trial court "considerable . . . deference" for its "fact-specific resolution" of the issue, the Minnesota

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1 Defendant does not point to any evidence that he sought to leave the interview and was prevented from doing so without an escort; rather, the assertion that "he had only been allowed to leave with a police escort" is a reference to the fact that he "was escorted when he used the restroom." On that point, the only evidence was that defendant "did go to the rest room," and there was an escort with him because that is something that "normally occurs" when Detective Bolden does interviews.

Supreme Court concluded "the trial court did not clearly err" in determining "that the police interrogation of Champion, although not custodial at the outset, became custodial in nature after he admitted choking the victim." (*Id.* at p. 44.)

Even if we agree with the conclusion that a noncustodial interview can be transformed into a custodial interrogation by a highly incriminating admission -- because a reasonable person would believe himself or herself to be in police custody after the admission -- that is nothing like what happened here, where defendant argues a reasonable person would have believed he was in police custody "*[b]y the time of* [his first] admission" (italics added) simply because he "had been in the room for hours," had been escorted to the bathroom, and "the detective's 'spotlight' was squarely directed at [him]."

Haas v. State (Alaska Ct. App. 1995) 897 P.2d 1333 is likewise distinguishable. There, the defendant was interviewed at a police station about a shooting at the Mush Inn that killed three people. (*Id.* at pp. 1333-1334.) The defendant initially admitted being at the scene but denied any involvement in the shooting. (*Id.* at p. 1334.) "However, as the interview progressed, [the defendant] stated that he strongly disliked the people at the Mush Inn because they were drug dealers. He said that he disliked the individuals because they had gotten his girlfriend 'doped up.' [He] began talking with [the police officer] about what might happen, hypothetically, if he admitted to being involved in the shootings. [He] indicated his belief that 'a guy would still go to jail for that.' [The officer]

responded that he could not say that 'it would never happen' and that he was not in a position to make any promises. He told [the defendant] that it was in [his] interest to be truthful and to give his side of the story. In response to [the defendant]'s question whether [the officer] was going to put him in jail 'today,' [the officer] assured him, 'I'm not going to arrest you today. That is not to say you won't be arrested.' [The defendant] then hypothetically suggested his involvement in the homicides and asked, '[A]re you gonna take me to jail right now . . . arrest me?' [The officer] did not give him a direct answer." (*Ibid.*)

The appellate court concluded the trial court "erred in determining that a reasonable person in [the defendant's] position would have felt free to leave" after the defendant "began to broadly hint that he was the one who had committed the homicides," "posed 'hypothetical' situations which strongly suggested his guilt," "asked the officer, "[A]re you gonna take me to jail right now . . . arrest me?'" and the officer ultimately "replied, 'I really don't know. I'd have to check . . . with my sergeant [and] with the district attorney.'" (*Haas v. State*, *supra*, 897 P.2d at p. 1336.)

Like the conclusion in *Champion*, the conclusion in *Haas* that a noncustodial interview morphed into a custodial interrogation turned on the fact that the defendant had made statements that were highly incriminating, even if they were posed as "'hypothetical' situations." This case involves no similar circumstance. Instead, defendant contends a reasonable

person would have believed his freedom of movement had been restrained to the degree associated with a formal arrest because he "had been in the room for hours," had been escorted to the bathroom, and "the detective's 'spotlight' was squarely directed at [him]." We disagree that these circumstances were sufficient to make defendant's noncustodial interview a custodial interrogation in the eyes of a reasonable person. Accordingly, we find no error in the denial of defendant's motion to suppress.

Defendant offers some argument about a later interrogation by another police detective who gave him proper *Miranda* warnings, but his argument appears to be that, under *Oregon v. Elstad* (1985) 470 U.S. 298 [84 L.Ed.2d 222], his incriminating statements during that later custodial interrogation were inadmissible because the later interrogation followed the earlier incriminating statements obtained by Detective Bolden's custodial questioning of him without a proper *Miranda* warning, and the later detective did not secure a sufficient waiver of his *Miranda* rights. Because we have concluded defendant was not in custody when Detective Bolden interviewed him, the premise for this remaining argument fails, and we need not consider it further.

II

Deliberation And Premeditation

Defendant contends there was insufficient evidence that he acted with deliberation and premeditation in killing Corser because there was no evidence of planning, there was no evidence

of a motive consistent with deliberation and premeditation, and the nature of the killing did not suggest deliberation and premeditation. We disagree.

Defendant premises this argument largely on the Supreme Court's decision in *People v. Anderson* (1968) 70 Cal.2d 15. There, the court "set forth standards, derived from the nature of premeditation and deliberation as employed by the Legislature and interpreted by this court, for the kind of evidence which is sufficient to sustain a finding of premeditation and deliberation." (*Id.* at pp. 25-26.) The court pointed out that "for a killing with malice aforethought to be first rather than second degree murder, '"[t]he intent to kill must be . . . formed upon a *pre-existing* reflection," . . . [and have] been the subject of actual deliberation or *forethought* . . . .'" (*Id.* at p. 26.) The court then explained that "[t]he type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing--what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of

considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id.* at pp. 26-27.)

Relying on *Anderson*, defendant contends the evidence here was insufficient to support a finding of deliberation and premeditation. Our Supreme Court has since explained, however, that "[t]he *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way. [Citation.] Nor did *Anderson* change the traditional standards of appellate review . . . . The *Anderson* guidelines are descriptive, not normative. [Citation.] The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.] [¶] In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

With this in mind, the question before us is whether, upon "review [of] the entire record in the light most favorable to the judgment below . . . it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt." (*People v. Perez*, *supra*, 2 Cal.4th at p. 1124.) "Even if we might have made contrary factual findings or drawn different inferences, we are not permitted to reverse the judgment if the circumstances reasonably justify those found by the jury. It is the jury, not the appellate court, that must be convinced beyond a reasonable doubt. Our task and responsibility is to determine whether that finding is supported by substantial evidence." (*Id.* at p. 1126.) Moreover, we must be mindful of the fact "that premeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'" (*Id.* at p. 1127.)

From the evidence in this case, the jury reasonably could have inferred the following. Defendant was hurt and angry because Sherman was spending time with her boyfriend, Taryn's father, even while she was living in the house where defendant had found her a room when she and Taryn had nowhere else to live. Still, he felt Corser had no right to comment on Sherman's behavior (carrying on with Taryn's father while living with defendant), and he threatened to "take care of it with

[Corser] one-on-one" if he kept doing it. In fact, he had gone so far as to tell one of the neighbors he was going to "take care of somethin' if [Corser] said something about [Sherman]." The matter came to a head on December 3, when Corser commented on Sherman "going down to [her] boyfriend's house" during the argument involving the $20 loan Corser had not paid back. After Sherman left, defendant decided to carry out his threat and -- as he later admitted to Sherman in the hidden letter to her -- "took care of the Chet (asshole) trouble" "[f]or good this time." He pushed over Corser's wheelchair, then beat and strangled Corser until he was dead. He then dragged Corser's body into his bedroom and pretended for the next several days that Corser was hiding there because of an argument with his nephew. Meanwhile, defendant immediately began spending Corser's money, including using it to buy Christmas presents for Taryn on a shopping trip with Sherman.

As the Supreme Court said in *Perez*, "As so viewed, the evidence is sufficient to support the jury's findings of premeditation and deliberation." (*People v. Perez*, *supra*, 2 Cal.4th at p. 1126.) There is evidence of both planning and motive in defendant's threats before the crime to "take care" of Corser if he continued bad-mouthing Sherman, which he did. Also, defendant may well have decided he wanted Corser's money, which he could use to put himself in Sherman's good graces by buying presents for Taryn. And while the manner of the killing, by itself, might be just as suggestive of a rash act rather than reflection and cold, calculated judgment, we must consider all

of the evidence taken together in determining its sufficiency. Although the evidence may not be "overwhelming, it is sufficient to sustain the jury's finding" because "the relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt, but whether *any* rational trier of fact could have been persuaded beyond a reasonable doubt that defendant premeditated the murder." (*Id.* at p. 1127.)

Here, a rational jury could have found beyond a reasonable doubt that defendant, in his state of distress over his relationship with Sherman, decided to kill Corser if Corser continued to comment on her relationship with Taryn's father, and he carried out that plan, beating and choking Corser to death after Sherman left the duplex on December 3 following Corser's latest comments. Consequently, the evidence was sufficient to support defendant's conviction for first degree murder.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.